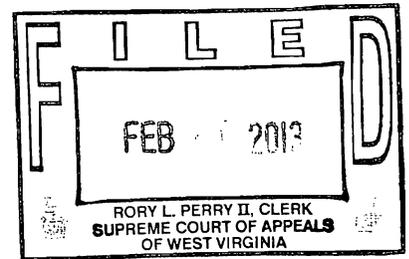


No. 13-0151



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

At Charleston

**STATE OF WEST VIRGINIA *ex rel.*
OCWEN LOAN SERVICING, LLC,**

Petitioner,

v.

**THE HONORABLE CARRIE WEBSTER,
Judge of the Circuit Court of Kanawha County,
West Virginia; Robert L. Curry and Tina M. Curry, individually, and on behalf of a
similarly situated class,**

Respondents.

*From the Circuit Court of
Kanawha County, West Virginia
Civil Action No. 10-C-2087*

PETITION FOR WRIT OF PROHIBITION

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Dated: February 20, 2013

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I. QUESTIONS PRESENTED

Whether the Respondent Circuit Court exceeded its authority and committed clear legal error by denying the Petitioner Ocwen Loan Servicing, LLC's ("Ocwen's") Motion to Compel Individual Arbitration and Dismiss, or, Alternatively, Stay Matter; specifically:

1. Whether the Circuit Court erred in finding that the provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "Dodd-Frank Act") prohibiting pre-dispute arbitration agreements in residential mortgage loans were effective as of July 22, 2010.
2. Whether the Circuit Court erred in finding that the provisions of the Dodd-Frank Act prohibiting pre-dispute arbitration agreements in residential mortgage loans applied retroactively to invalidate an arbitration agreement entered into nearly four years before the passage of the Dodd-Frank Act.
3. Whether the Circuit Court erred in finding that the United States Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*, --- U.S. ---, 131 S. Ct. 1740 (2011), and its interpretation of the preemptive effect of the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.*, are not applicable to state court proceedings.
4. Whether the Circuit Court erred in finding that the arbitration agreement executed by Plaintiffs Robert and Tina Curry was unconscionable under state law.
5. Whether the Circuit Court's finding that the arbitration agreement executed by Plaintiffs Robert and Tina Curry was unconscionable under state law is preempted, in whole or in part, by the Federal Arbitration Act.

II. STATEMENT OF THE CASE

This Petition arises from an Order entered by the Circuit Court of Kanawha County ("Circuit Court") denying Ocwen's Motion to Compel Individual Arbitration and Dismiss or, Alternatively, Stay Matter ("Motion to Compel Arbitration"). Neither Plaintiffs, Robert L. and Tina M. Curry (the "Currys"), nor the Circuit Court dispute that the Currys executed an agreement to arbitrate in 2006 in connection with their mortgage loan transaction or that the present dispute falls within the scope of that agreement. The Circuit Court, nevertheless, found that the subject arbitration agreement was unenforceable under the Dodd-Frank Act and

unconscionable under West Virginia state law. The Circuit Court's findings are wrong as a matter of federal and state law.

First, the provision of the Dodd-Frank Act the Circuit Court relied upon was not effective at the time it entered its Order. And, even assuming that the provision was effective, the Dodd-Frank Act cannot be applied retroactively to invalidate an agreement entered into almost four years before its enactment. By applying the Dodd-Frank Act retroactively, the Circuit Court ignored the strict presumption against retroactive application of statutes and misconstrues and misapplies the controlling precedents of the United States Supreme Court.

Second, the Circuit Court's conclusion that the Currys' arbitration agreement is unconscionable, and thus unenforceable under West Virginia law, is not supported by and is inconsistent with state and federal law. The arbitration agreement is neither procedurally nor substantively unconscionable under West Virginia law and should be enforced according to its terms. Indeed, the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, *et seq.*, reflects a strong and "liberal" public policy in favor of the strict enforcement of arbitration agreements by the terms set forth therein. *See AT&T Mobility LLC v. Concepcion*, --- U.S. ---, 131 S. Ct. 1740, 1748 (2011). The FAA's strict policy in favor of arbitration mandates reversal of the Circuit Court's Order and enforcement of the arbitration agreement, including the class action waiver, as written.

For these reasons, the Court should issue a writ of prohibition halting enforcement of the Circuit Court's Order, compel the Currys to submit their claims to individual arbitration, and dismiss the Currys' complaint, or alternatively stay this matter pending arbitration.

A. Procedural Background

On November 23, 2011, the Currys filed a complaint against Ocwen in the Circuit Court. The Currys' complaint asserts three causes of action allegedly arising from Ocwen's assessment of certain fees in connection with its servicing of their loan. [A.3]. The Currys specifically

allege that, after defaulting on their loan, Ocwen assessed four allegedly unlawful charges: a “statutory mailings” charge of \$210.94, a “skip trace/search” charge of \$50.00, a “FC -thru service” charge of \$550.00, and a “title report fee” of \$300.00. [A.4]. The Currys allege that Ocwen’s assessment of these charges violated Sections 46A-2-115(a), 127(d), 127(g), and 128(c) of the West Virginia Consumer Credit Protection Act (“WVCCPA”). [A.4-6]. The Currys seek relief in the form of civil penalties in the amount of \$4,600 “for each [allegedly] illegal fee assessed,” actual damages, reasonable attorneys’ fees, and pre- and post-judgment interest. [A.6]. The Currys seek to bring claims on behalf of themselves and on behalf of “a class of West Virginia borrowers with loans serviced by Ocwen.” [A.4].

On January 5, 2012, Ocwen filed its Motion to Compel Arbitration in the Circuit Court. [A.9]. Thereafter, the Currys filed a Memorandum in Opposition to Ocwen’s Motion to Compel Arbitration [A.64], and Ocwen filed a Reply in further support of its Motion [A.131]. On February 28, 2012, the Court held a hearing on Ocwen’s Motion to Compel Arbitration. On March 13, 2012, Ocwen submitted Proposed Findings of Fact, Conclusions of Law and Order Granting its Motion to Compel Arbitration. [A.152]. On the same date, the Currys submitted a Proposed Order Denying Defendants’ Motion to Compel Arbitration. [A.184].

On January 10, 2013, the Circuit Court entered an Order Denying Defendants’ Motion to Compel Arbitration. [A.320]. Based on what appears to be a clerical error, the Circuit Court Clerk’s office served the Order on Ocwen, on or about January 11, 2013, through its registered agent in West Virginia and not directly on counsel of record. As such, the undersigned counsel did not receive a copy of the Circuit Court’s Order until January 22, 2013. Despite not receiving the Circuit Court’s Order until that late date, counsel for Ocwen has sought to file the instant

petition and seek the requested writ of prohibition with all due haste (submitting this Petition within 29 days of counsel receiving a copy of the Order).

In its Order (which adopted the Currys' proposed order in its entirety), the Circuit Court concluded that the Currys' Arbitration Agreement was unenforceable and invalid under federal and state law. [A.320]. First, the Circuit Court found that Section 1414 of the Dodd-Frank Act, which prohibits pre-dispute arbitration agreements in connection with residential mortgage loans, rendered the Currys' Arbitration Agreement unenforceable as a matter of federal law. [A.321-324]. The Circuit Court held that Section 1414 of the Dodd-Frank Act became effective on July 22, 2010 or, at the latest, December 30, 2011, and that Section 1414 should be applied retroactively to bar enforcement of arbitration agreements entered into before the enactment of the Act. [*Id.*].

Second, the Circuit Court found that the Currys' arbitration agreement was unconscionable under West Virginia law. [A.324-330]. The Circuit Court ruled that the Currys' arbitration agreement was procedurally unconscionable based on the perceived, yet unsupported, finding that the arbitration agreement was a contract of adhesion and that there existed a "gross inequality" in bargaining power between the Currys and their original lender. [A.325-326]. The Circuit Court also found the arbitration agreement substantively unconscionable on the grounds that the Agreement lacked mutuality, included a class action waiver restricting the Currys' ability to vindicate their rights under the WVCCPA, prohibited the Currys from recovering attorneys' fees, and "may" limit the discovery available in arbitration. [A.326-328]. The Circuit Court also rejected the argument that portions of its unconscionability analysis were preempted by the FAA. [A.329-330]. For the reasons set forth below, the Circuit Court's findings are wrong as a matter of law and should be reversed.

B. Factual Background

On or about October 17, 2006, the Currys executed an Adjustable Rate Note (“Note”), pursuant to which they promised to repay their lender, Saxon Mortgage, Inc. (“Saxon”), \$78,000, plus interest, over thirty years. [A.4; 34]. As security for the Note, the Currys executed a Deed of Trust (“Deed of Trust”) identifying certain property in Charleston, West Virginia (the “Property”). [A.40-43]. As part of the Deed of Trust, the Currys separately executed a written Arbitration Rider (the “Arbitration Agreement”). [A.41; 60-62].

The Arbitration Agreement is a three-page agreement that was executed in connection with and is incorporated into the Currys’ Deed of Trust. [A.40; 60]. The Arbitration Agreement provides that “THIS RIDER ... is incorporated into and shall be deemed to amend and supplement the Mortgage, Deed of Trust, or Security Deed.” [A.60]. The Deed of Trust further defines “Security Instrument” to include “this document [*i.e.*, the Deed of Trust] . . . together with all Riders to this document.” [A.40].

The Arbitration Agreement further provides that the Currys and “Lender” agree that “[a]ll disputes, claims, or controversies arising from or related to the loan evidenced by the Note (the ‘Loan’), including statutory claims, shall be resolved by binding arbitration, and not by court action.” [A.60]. The Arbitration Agreement contains a limited exclusion from arbitration for the “Lender” to exercise its rights to take certain actions to enforce and foreclosure upon the Currys’ mortgage loan. [A.61]. The Arbitration Agreement defines the term “Lender” to include “the company servicing the Note on Lender’s behalf (the ‘Servicer’).” [A.60]. Ocwen is the current servicer of the Currys’ loan. [A.4].

The Arbitration Agreement is governed by the FAA. [A.60]. The Agreement’s express terms provide that “[t]his arbitration agreement is made pursuant to a transaction involving interstate commerce, and shall be governed by the Federal Arbitration Act.” [*Id.*]. The

Arbitration Agreement requires the application of applicable state law to the merits of the claims at issue in any arbitration, providing that “[t]he arbitrator shall set forth in the award findings of fact and conclusions of law supporting the decision, which must be based on applicable law and supported by substantial evidence presented in the proceeding.” *Id.* The Arbitration Agreement further requires the arbitration to take place in the same geographic area in which the Property is located. *Id.*

Importantly, the Arbitration Agreement contains an express provision that shifts the vast majority of arbitration-related fees from the Currys to Ocwen. The Agreement provides that where an arbitrable claim “pertains solely to the Loan,” the Currys are only required to pay a maximum of \$125 towards any initial filing fees for the arbitration, and “[t]he Lender” is required to “pay any balance of such initial fees” as well as “all other fees and costs of the arbitration.” [A.61]. The Arbitration Agreement also contains a provision that precludes both the Currys and Ocwen from obtaining from the opposing party any attorneys’ fees or costs incurred in connection with the arbitration; “[i]n no event shall either party be responsible for any fees or expenses of any of the other party’s attorneys, witnesses, or consultants, or any other expenses, for which such other party reasonably would have been expected to be liable had such other party initiated a suit in the courts of the jurisdiction in which the borrower resides regarding a similar dispute.” *Id.*

Pursuant to the express terms of the Arbitration Agreement, all parties to the Agreement waived the ability to pursue their claims on a class basis. [A.60]. Specifically, the Arbitration Agreement contains an express class action waiver, which provides that “[a]ll disputes subject to arbitration under this agreement shall be arbitrated individually, and shall not be subject to being

joined or combined in any proceeding with any claims of any persons or class of persons other than [plaintiffs] or Lender.” *[Id.]*.

The Deed of Trust and Arbitration Agreement are also governed by an express severability clause. [A.53]. The Deed of Trust provides that “[i]n the event that any provision or clause of this Security Instrument or the Note conflicts with Applicable Law, such conflict will not affect other provisions of this Security Instrument or the Note which can be given effect without the conflicting provision.” *[Id.]*. As noted above, the Deed of Trust defines “Security Instrument” to include the Arbitration Agreement. [A.40].

Directly above the signature lines on the Arbitration Agreement, the Agreement provides the following explicit notification to the borrower:

NOTICE: BY SIGNING THIS ARBITRATION RIDER, YOU ARE AGREEING TO HAVE ANY DISPUTE ARISING OUT OF THE MATTERS DESCRIBED IN THE “ARBITRATION OF DISPUTES” SECTION ABOVE DECIDED EXCLUSIVELY BY ARBITRATION, AND YOU ARE GIVING UP ANY RIGHTS YOU MIGHT HAVE TO LITIGATE DISPUTES IN A COURT OR JURY TRIAL. DISCOVERY IN ARBITRATION PROCEEDINGS MAY BE LIMITED BY THE RULES OF PROCEDURE OF THE SELECTED ARBITRATION SERVICE PROVIDER.

[A.62]. The Arbitration Agreement’s signature page also contains the following provision (immediately below the above-quoted notification):

THIS IS A VOLUNTARY ARBITRATION AGREEMENT. IF YOU DECLINE TO SIGN THIS ARBITRATION AGREEMENT, LENDER WILL NOT REFUSE TO COMPLETE THE LOAN TRANSACTION BECAUSE OF YOUR DECISION.

[Id.]. Directly below the express notification and voluntary-agreement provisions, the Arbitration Agreement states that: “BY SIGNING BELOW, Borrower accepts and agrees to the provisions contained in this Rider.” *[Id.]*. The Currys executed the Arbitration Agreement by signing below this notice. *[Id.]*. The Currys also initialed the other two pages of the Agreement. [A.60-61].

III. SUMMARY OF ARGUMENT

The Circuit Court's Order denying Ocwen's Motion to Compel Arbitration is predicated on several manifest, fundamental and clear errors of law. These errors mandate that this Court issue a writ of prohibition, halt the enforcement of the Circuit Court's Order, and compel the Currys' to submit their claims to individual arbitration.

First, the Circuit Court found that the Currys' Arbitration Agreement was unenforceable by operation of the Dodd-Frank Act's prohibition on pre-dispute arbitration agreements in residential mortgage loans. In so holding, the Circuit Court relied upon two erroneous conclusions of law: (1) that the Dodd-Frank Act's arbitration restriction became effective on July 22, 2010 (or, at the latest, on December 30, 2011); and (2) that the Dodd-Frank Act's arbitration restriction could be applied retroactively. Each of these rulings is wrong as a matter of law.

The plain language of Title XIV of the Dodd-Frank Act (of which the subject arbitration prohibition is a part), makes clear that the arbitration prohibition was scheduled to take effect on one of two possible dates, either the date of implementation of the section pursuant to the issuance of final regulations, or, if no regulations were issued, by January 21, 2013. No such regulations were promulgated as of January 21, 2013. As such, the Dodd-Frank Act's arbitration provision did not become effective on July 22, 2010 (or December 30, 2011) and, in fact, did not become effective until after the Circuit Court entered its Order. The Circuit Court's contrary conclusion ignores the plain language of the Act and should be rejected.

Notwithstanding the actual effective date, the Dodd-Frank Act's arbitration prohibition cannot be applied retroactively to invalidate the Currys' Arbitration Agreement, which was executed almost four years before the July 2010 enactment of the Act and over six years before that provision took effect. Indeed, the well-settled "presumption against retroactivity" mandates that the Dodd-Frank Act's arbitration restriction apply prospectively-only. That is because Title

XIV of the Dodd-Frank Act includes express effectiveness language that provides for the arbitration prohibition, among other provisions, to become effective in the future (here, almost three years after the Act's original enactment). Had Congress intended a retroactive application of the Act, it could have made the Act's provisions effective immediately. Yet, Congress chose not to do so. Moreover, nothing in Title XIV of the Dodd-Frank Act purports to provide a direct, clear, and unambiguous intent that its provisions apply retroactively. Finally, the Dodd-Frank Act cannot be applied retroactively to invalidate the Arbitration Agreement because such application would impair the parties' substantive contractual rights, render invalid an agreement that was lawful at the time it was entered, and, thus, eviscerate the predictability and stability of the parties' earlier agreement to arbitrate.

Second, the Circuit Court found that the United States Supreme Court's decision in *AT&T Mobility v. Concepcion* and the analysis of the preemptive scope of the FAA set forth therein does not apply to cases in state court. The Circuit Court's conclusion, however, is unsupported by case law and, instead, is curiously based solely on the Court's speculation as to what Justice Thomas *might* do in some future case. The Circuit Court's argument is pure speculation and has no support in *Concepcion* or elsewhere. The Circuit Court's finding is contrary to the clear instructions from the Supreme Court that a state court "must abide by the FAA, which is the supreme Law of the Land . . . and by the opinions of this Court interpreting that law." *Nitro-Lift Techs., L.L.C. v. Howard*, --- U.S. ---, 133 S. Ct. 500, 503 (2012).

Third, the Circuit Court found that the Arbitration Agreement was unconscionable and unenforceable under state law. The Circuit Court's conclusion is incorrect as a matter of law; the Arbitration Agreement is neither procedurally nor substantively unconscionable. The Circuit Court committed clear legal error when it refused to enforce the Agreement by its plain terms.

As to procedural unconscionability, the Arbitration Agreement is not a contract of adhesion. The Agreement was, by its express terms, “a voluntary arbitration agreement,” and made clear that even if the Currys “decline[d] to sign this arbitration agreement,” their original lender would still complete the loan transaction. As such, the Agreement was not offered on a “take-it-or-leave-it” basis and was not a contract of adhesion. Even assuming, however, that the Arbitration Agreement was adhesionary, the circumstances presented here do not exhibit a “gross inadequacy” in bargaining power to support a finding of procedural unconscionability. Indeed, the Currys presented no evidence (and the Circuit Court points to none) to support a finding of “gross inadequacy.” The voluntary nature of the Agreement combined with the Currys’ opportunity to opt out and still close their loan belies any such finding. The Currys are bound to the provisions of the Agreement that they knowingly executed, and the Circuit Court cannot re-write the Agreement or alter its effect.

As to substantive unconscionability, the Circuit Court’s conclusion is fundamentally flawed. First, the class action waiver in the Agreement does not, and cannot, support a finding of substantive unconscionability. Indeed, the Circuit Court’s reliance on a “vindication-of-statutory-rights” analysis is preempted by the FAA and *Concepcion*. And, even if not preempted, there is no evidence in the record, beyond mere speculation, to establish that being compelled to arbitrate on an individual basis might impair the Currys’ ability to fully exercise their statutory rights. In fact, the claims asserted and the relief sought by the Currys contradicts any such conclusion as the Currys’ potential individual recovery and the Agreement’s fee-shifting provisions provide the Currys with sufficient incentive to pursue their claims on an individual basis. Thus, even if the FAA did not preempt the Circuit Court’s analysis, the class action waiver does not support a finding of substantive unconscionability.

Second, the attorneys' fees restriction set forth in the Arbitration Agreement is similarly not unconscionable as the Currys have sufficient incentive to adjudicate their individual claims without the potential recovery of attorneys' fees, and, in any event, the restriction applies equally to the Currys and Ocwen. Even assuming, however, that the fee restriction could be found to be unconscionable, the restriction can, and should, be severed from the Arbitration Agreement and the Court should enforce the remaining provisions of the Agreement.

Finally, the Arbitration Agreement is an enforceable bilateral agreement as both parties are required to submit disputes regarding the Currys' loan to arbitration. The limited exception that permits Ocwen to accelerate payments and foreclose under applicable law does not alter that conclusion. This exception merely preserves Ocwen's necessary and independent right to foreclose and regain the property by lawful foreclosure processes. Similarly, the potential that discovery *might* be limited in arbitration does not support a finding of unconscionability.

For these reasons, the Court should prohibit the enforcement of the Circuit Court's Order, and compel the Currys to submit their claims to individual arbitration.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is necessary under Rule 18(a) of the West Virginia Rules of Appellate Procedure. This case is appropriate for a Rule 20 argument because it involves issues of first impression, issues of fundamental public importance, and constitutional questions related to the preemptive scope of the FAA.

V. ARGUMENT

A. The Facts Of This Case Warrant The Granting Of A Writ Of Prohibition

Under West Virginia Code § 53-1-1, a right to a writ of prohibition shall lie, in part, where a Circuit Court "exceeds its legitimate powers." W. Va. Code § 53-1-1. This Court has recently reiterated that "[a] petition for a writ of prohibition is an appropriate method to obtain

review . . . of a circuit court’s decision to deny or compel arbitration.” *State ex rel. Johnson Controls, Inc. v. Tucker*, 729 S.E.2d 808, 814 (W. Va. 2012).

In determining the appropriateness of a writ of prohibition, the Court has identified five guiding factors. *See id.* at 814-15. Those factors are:

(1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal’s order is clearly erroneous as a matter of law; (4) whether the lower tribunal’s order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal’s order raises new and important problems or issues of law of first impression.

Id. at 815 (internal quotation omitted). A party seeking a writ need not satisfy all five factors, but the Court has highlighted the substantial importance of the third factor – “the existence of clear error as a matter of law” – in evaluating a petition for a writ of prohibition. *Id.* Consistent with these guiding factors, the circumstances presented here weigh in favor of the issuance of a writ of prohibition halting enforcement of the Circuit Court’s Order.

First, the Circuit Court’s Order is predicated on several manifest, fundamental and clear errors of law. These errors include the Circuit Court’s legal conclusions regarding the effective date and retroactivity of the Dodd-Frank Act’s prohibition on arbitration agreements in residential mortgage loans (*see* Section V.B, *infra.*), its legal rulings regarding the applicability of the United States Supreme Court’s *Concepcion* decision and the preemptive effect of the FAA (*see* Section V.C.2, *infra.*), and its findings regarding the unconscionability of the Currys’ Arbitration Agreement (*see* Section V.C.3, *infra.*).

Second, Ocwen does not have a right to a direct appeal and, as such, has “no other adequate means” to obtain review of the Circuit Court’s erroneous rulings. Unlike the FAA, which provides a right to a direct appeal from an order denying a motion to compel arbitration (*see* 9 U.S.C. § 16(a)(1)(B)), this Court has held that it does not have appellate jurisdiction over

an order denying a motion to compel arbitration absent a final judgment. *See McGraw v. American Tobacco Co.*, 681 S.E.2d 96, 106 (W. Va. 2009); *see also Johnson Controls, Inc.*, 729 S.E.2d at 814. Ocwen has no means to seek review of the Circuit Court’s Order absent a final judgment. Accordingly, Ocwen would need to proceed through discovery – which would likely include individual discovery, class certification related discovery, and, possibly, class merits discovery – undergo briefing and argument on class certification, brief and argue motions for summary judgment and other dispositive motions, and possibly even prepare for and conduct a trial (whether an individual trial or a more onerous class action trial) before it could obtain meaningful relief from the Circuit Court’s Order. Such an undertaking would not only be time consuming for the parties and the Circuit Court, but it would also require Ocwen and the Currys to incur substantial legal fees and expenses to proceed through a potential class action litigation over which the Circuit Court did not have jurisdiction in the first place. Further, if Ocwen were to succeed on its appeal, the parties would be required to relitigate the entire case in the arbitral forum. This result is directly inconsistent with the judicial economy concerns that underlie the “final judgment” rule. *See James M.B. v. Carolyn M.*, 456 S.E.2d 16, 19 n.2 (W. Va. 1995). As this Court has recognized “[t]he unreasonableness of the delay and expense” in compelling parties to undergo “an expensive, complex trial and appeal from a final judgment” before permitting appellate review of erroneous rulings of law weighs heavily in favor of the issuance of a writ of prohibition. *State ex rel. Wiseman v. Henning*, 569 S.E.2d 204, 208 (W. Va. 2002).

Third, and for these same reasons, Ocwen will be damaged and will suffer prejudice “in a way that is not correctable on appeal” if it is forced to wait until final judgment to obtain appellate review. Indeed, if Ocwen is required to devote the time and incur the substantial expense of litigating a *putative class action* through final judgment before having any appellate

review opportunity, Ocwen is effectively precluded any meaningful appellate review opportunity. And, even if ultimately successful on appeal, Ocwen will not be able to recover the time and money spent in litigating a case that it would then be forced to re-litigate in arbitration.

Based on the same rationale, the FAA provides for an unequivocal right to appeal any order “denying a petition to order arbitration to proceed.” 9 U.S.C. § 16(a)(1)(B). Under the FAA, “a party who believes that arbitration is required by an agreement between the parties need not suffer the expense and inconvenience of litigation before receiving appellate review of a [lower] court judgment that arbitration was inappropriate.” *Wheeling Hospital, Inc. v. Health Plan of the Upper Ohio Valley, Inc.*, 683 F.3d 577, 584 (4th Cir. 2012). This Court has similarly recognized the importance of providing immediate reviews of decisions denying motions to compel arbitration. *See, e.g., Johnson Controls, Inc.*, 729 S.E.2d at 814.

Fourth, the Circuit Court’s Order raises new and important issues of first impression in West Virginia (and elsewhere) that are likely to reoccur in the future. The Circuit Court’s ruling regarding the effectiveness and retroactivity of the Dodd-Frank Act’s arbitration prohibition are issues that neither this Court nor any other published appellate court opinion has addressed. And, as mortgage-related litigation continues in the wake of the sub-prime crisis, the applicability of the arbitration prohibition, among other portions of the Dodd-Frank Act, will arise in future cases in West Virginia and throughout the country. Similarly, the Circuit Court’s unique, and erroneous, conclusions regarding the applicability of *Concepcion* and the FAA preemption analysis set forth therein present important issues that will certainly impact the evaluation of arbitration agreements by the courts. This Court’s guidance on these issues, and the other issues presented by this Petition, would prove invaluable to the lower courts in this state as well as to courts in other states and the federal judiciary.

This Petition, therefore, satisfies this Court’s standard for the issuance of a writ of prohibition to halt the enforcement of the Circuit Court’s Order and to compel the Currys to submit their claims to individual arbitration per the terms of their Arbitration Agreement

B. The Dodd-Frank Act Does Not Apply And Does Not Preclude Enforcement Of The Arbitration Agreement

In denying Ocwen’s Motion to Compel Arbitration, the Circuit Court found that the Currys’ Arbitration Agreement was unenforceable under the Dodd-Frank Act. In so finding, the Circuit Court relied upon Section 1414 of the Dodd-Frank Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010), which amends Section 129C of the Truth-in-Lending-Act (“TILA”) to prohibit pre-dispute arbitration agreements in residential mortgage loans that are secured by a borrower’s principal dwelling. *See* 15 U.S.C. § 1639c(e)(1). The Circuit Court’s reliance on this provision is misplaced. The amendment to TILA set forth in Section 1414 of the Dodd-Frank Act was not effective at the time of the Circuit Court’s Order and, notwithstanding the effective date of the amendment, the Dodd-Frank Act’s arbitration prohibition cannot be applied retroactively to invalidate an agreement entered into almost four years before its passage.

1. The Dodd-Frank Act’s Amendments To The Truth-In-Lending Act Were Not Effective At The Time Of The Circuit Court’s Order

The Dodd-Frank Act was passed by Congress on July 21, 2010. At the time of its enactment, the Act set forth a general effective date of July 22, 2010. *See* Pub. L. No. 111-203, 124 Stat. 1390, § 4. The Act, however, provides that its provisions may be governed by different, more specific “effectiveness” rules tailored to specific portions or sections. *See id.*

Section 1414 of the Dodd-Frank Act was enacted as part of Title XIV of the Act. Title XIV, entitled the Mortgage Reform and Anti-Predatory Lending Act (*see* Dodd-Frank Act § 1400), contains an express provision establishing when its amendments become effective. Subsections (c)(2) and (c)(3) of Section 1400 specifically provide as follows:

(c) REGULATIONS; EFFECTIVE DATE -- ...

(2) EFFECTIVE DATE ESTABLISHED BY RULE – Except as provided in paragraph (3), a section, or provision thereof, of this title *shall take effect on the date on which the final regulations implementing such section, or provision, take effect.*

(3) EFFECTIVE DATE – A section of this title for which regulations have not been issued on the date that is 18 months after the *designated transfer date* shall take effect on such date.

Id. (emphasis added).

The “designated transfer date” set forth in the Act (*see* Dodd-Frank Act § 1062) was July 21, 2011. *See* 75 Fed. Reg. 57252, 57, 253 (Sept. 20, 2010). As such, the provisions of Section 1414 of the Dodd-Frank Act (and all of Title XIV) were scheduled take effect on one of two possible dates: (1) the date of “implementation” pursuant to the issuance of “final regulations;” or (2) if no regulations are issued, the date “18 months after the designated transfer date,” or January 21, 2013. *See* Dodd-Frank Act § 1400(c). As of the date of the entry of the Circuit Court’s Order, no final regulations implementing Section 1414’s pre-dispute arbitration agreement provision had been promulgated.¹ As such, Section 1414’s provision regarding pre-dispute arbitration agreements did not become effective until January 21, 2013, at the earliest.

Despite the explicit language of Section 1400, the Circuit Court ruled that the arbitration prohibition took effect on July 22, 2010. [A.321]. The Circuit Court rested its decision on the statement that Section 1414 “does not require any regulations to be promulgated” and, thus, that the Act’s general effectiveness provision governed. [*Id.*]. Tellingly, the Court did not cite any authority for this proposition. Section 1400(c), to the contrary, clearly provides for *only* two

¹ On September 7, 2012, the Consumer Financial Protection Bureau (“CFPB”) issued a “proposed rule” that addressed, in part, the “Dodd-Frank Act restriction on mandatory arbitration.” CFPB, Proposed Rule with Request for Public Comment, Truth in Lending Act (Regulation Z); Loan Originator Compensation, 77 Fed. Reg. 55272-01, 55272, 55329-30 (Sept. 7, 2012). As of January 22, 2013, the CFPB had not yet issued a final rule implementing the proposed Loan Originator Compensation rule. *See* CFPB, Escrow Requirements Under the Truth in Lending Act (Regulation Z), 78 Fed. Reg. 4,726-01, 4729 (Jan. 22, 2013).

possible effective dates, neither of which is July 22, 2010. The Circuit Court’s creation of a third potential effective date has no basis in the statutory language of Section 1414, Section 1400, or any provision of Title XIV and should be rejected. *See State v. Richards*, 526 S.E.2d 539, 543 (W. Va. 1999) (“the plain meaning of legislation should be conclusive” (internal quotation marks omitted)). In the absence of a “final regulation” implementing Section 1414, the pre-dispute arbitration provision *could not* have become effective until January 21, 2013, at the earliest. *See Williams v. Wells Fargo Bank N.A.*, No. 11-21233-CIV, 2011 WL 4368980, at *5-6 (S.D. Fla. Sept. 19, 2011) (sections of Title XIV for which regulations are not implemented or required “do[] not become effective until 18 months after the designated transfer date”).

The Circuit Court’s reliance on an “interim rule” promulgated by the CFPB to support its alternative finding that the arbitration prohibition took effect, at the latest, on December 30, 2011, is equally flawed. First, the “interim” rule relied upon by the Circuit Court does not address Section 1414’s arbitration provision and, thus, cannot “implement” that portion of the Act. Second, an “interim rule” is not a “final regulation” and does not satisfy Section 1400(c)(2). Had Congress intended for Section 1400(c)(2) to be satisfied by an interim rule, it could have said so expressly. *See Richards*, 526 S.E.2d at 543 (“a statute may not, under the guise of interpretation, be modified, revised, amended, distorted, remodeled, or rewritten” (internal quotation omitted)).

The plain language of Section 1400 of the Dodd-Frank Act makes clear that Section 1414’s arbitration prohibition was not in effect at the time of the entry of the Circuit Court’s Order and did not take effect until, at the earliest, January 21, 2013. *See Bates v. JPMorgan Chase Bank, N.A.*, No. 4:12-CV-43 (CDL), 2012 WL 3727534, at *4 (M.D. Ga. Aug. 27, 2012). The Act’s arbitration prohibition thus does not, and cannot, apply to the Currys’ Arbitration

Agreement. See *McGinnis v. Am. Home Mortgage Servicing*, No. 5:11-CV-284, 2012 WL 426022, at *4 (M.D. Ga. Feb. 9, 2012); *Patton v. Ocwen Loan Servicing, LLC*, No. 6:11-cv-445-Orl-19DAB, 2011 WL 3236026, at *4 (M.D. Fla. July 28, 2011).

2. Section 1414 Of The Dodd-Frank Act Does Not Apply Retroactively To Arbitration Agreements Entered Into Prior To Its Enactment

Even assuming that Section 1414 of the Dodd-Frank Act was effective before January 21, 2013, the pre-dispute arbitration prohibition cannot apply retroactively to invalidate an arbitration agreement that was executed almost four years before the Act's enactment and six years before the Act's earliest possible effective date.

Courts must generally construe statutes to operate prospectively only and not to operate retroactively to impair a party's rights arising before the statute's enactment. See *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265, 269-70 (1994); *Ward v. Dixie Nat'l Life Ins. Co.*, 595 F.3d 164, 172 (4th Cir. 2010). The United States Supreme Court has repeatedly held that "[r]etroactivity is not favored in the law" and that "congressional enactments . . . will not be construed to have retroactive effect unless their language requires this result." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). This "presumption against retroactivity" is "deeply rooted" in American jurisprudence and "embodies a legal doctrine centuries older than our Republic." *Landgraf*, 511 U.S. at 265. "Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted." *Id.* Thus, the presumption against retroactivity protects against the "unfairness of imposing new burdens . . . after the fact."² *Id.* at 265-66, 270; *Hughes Aircraft Co. v. U.S. ex rel. Schumer*, 520 U.S. 939, 946 (1997).

² West Virginia law is equally hostile to the retroactive application of statutes. See W. Va. Code § 2-2-10(bb) ("[a] statute is presumed to be prospective in its operation unless expressly made retrospective"). "The presumption is that a statute is intended to operate prospectively, and not

To determine whether a statute applies retroactively, courts “first look to whether Congress has expressly prescribed the statute’s proper [temporal] reach.” *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 37 (2006) (internal quotation marks omitted). If Congress has not expressly done so, the court must attempt “to draw a comparably firm conclusion about the temporal reach [of the statute] specifically intended by applying ... normal rules of construction.” *Id.* (internal quotation marks omitted). A statute will not be given retroactive effect “unless such construction is required by *explicit language* or by *necessary implication*” (*id.* (emphasis added)), nor will a statute be applied retroactively “absent a clear indication from Congress that it intended such a result” (*I.N.S. v. St. Cyr*, 533 U.S. 289, 316 (2001)). Indeed, the Supreme Court has “found truly ‘retroactive’ effect adequately authorized by statute [only where the statutes at issue] involved statutory language that was so clear that it could sustain only one interpretation.” *St. Cyr*, 533 U.S. at 316-17 (quotations omitted).

If the statute does not reflect a clear temporal scope, the Court must apply the strict “presumption against retroactivity” if the application of the statute has a detrimental effect on “substantive rights, liabilities, or duties ... arising before [the statute’s] enactment,” “impair[s] rights a party possessed when he acted,” or “impose[s] new duties with respect to transactions already completed.” *Landgraf*, 511 U.S. at 277, 280; *Hughes Aircraft Co.*, 520 U.S. at 947. “The largest category of cases in which . . . the presumption against statutory retroactivity has [been applied] involve[s] new provisions affecting contractual or property rights, matters in which predictability and stability are of prime importance.” *Landgraf*, 511 U.S. at 271.

retrospectively, unless it appears, by clear, strong and imperative words or by necessary implication, that the Legislature intended to give the statute retroactive force and effect.” *Cabot Oil & Gas Corp. v. Huffman*, 705 S.E.2d 806, 815 (W. Va. 2010) (quotations omitted).

The Circuit Court misconstrues these well-settled standards and seeks to have statutory “silence” interpreted as evidence of a Congressional intent for retroactive application; in effect, enacting a presumption in favor of retroactivity. In support of this erroneous position, the Circuit Court invokes *Bradley v. School Board of Richmond*, 416 U.S. 696 (1974). [A.322]. While the Supreme Court in *Bradley* did state that, in general, “a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary,” (*Bradley*, 416 U.S. at 711), the Supreme Court has made crystal clear “that *Bradley* did not alter the well-settled presumption against application of the class of new statutes that would have genuinely ‘retroactive’ effect.” *Landgraf*, 511 U.S. at 278. The Supreme Court further held that *Bradley* “did not intend to displace the traditional presumption against applying statutes affecting substantive rights, liabilities, or duties to conduct arising before their enactment.” *Id.* Indeed, the *Landgraf* Court explained that despite the seemingly contradictory statements in *Bradley*, “prospectivity remains the appropriate default rule” because the presumption against retroactivity “accords with widely held intuitions about how statutes ordinarily operate” and “generally coincide[s] with legislative and public expectations.” *Landgraf*, 511 U.S. at 270-72. *Bradley* does not alter or otherwise abrogate the strict presumption against retroactivity.

Here, Congress has prescribed the temporal reach of Title XIV of the Dodd-Frank Act, including Section 1414, by expressly enacting Section 1400’s effective-date provisions. “Courts have repeatedly held that the inclusion of an effective date is inconsistent with legislative intent to apply the statute retroactively.” *Ward*, 595 F.3d at 175. The express language of Section 1400 – providing that Section 1414 will take effect at a future date – confirms that Congress did not intend Section 1414 to apply retroactively and, instead, intended Section 1414 to apply

prospectively only. *See Henderson v. Masco Framing Corp.*, No. 3:11-CV-00088-LRH, 2011 WL 3022535, at *3 (D. Nev. July 22, 2011); *Blackwell v. Bank of Am. Corp.*, No. 7:11-2475-JMC-KFM, 2012 WL 1229673, at *3-4 (D. S.C. Mar. 22, 2012).

Even setting aside the explicit effective date, nothing in the language of Section 1414 provides, or even suggests, that the Section is intended to apply retroactively to agreements that were made prior to its enactment or effective date. *See Taylor v. Fannie Mae*, 839 F. Supp. 2d 259, 262 n. 3 (D.D.C. 2012); *Henderson*, 2011 WL 3022535 at *3-4; *Megino v. Linear Fin.*, No. 2:09-CV-00370-KJD-GWF, 2011 WL 53086, at *8 n.1 (D. Nev. Jan. 6, 2011). Simply put, section 1400 of the Dodd-Frank Act cannot be read to provide a direct, clear, and unambiguous intent that its provisions apply retroactively. *See St. Cyr*, 533 U.S. at 316-17. For this reason alone, the Court should reverse the Circuit Court's retroactive application of Section 1414.

Moreover, the retroactive application of Section 1414's arbitration restriction would necessarily affect and impair the parties' substantive contractual rights, particularly the parties' right to agree how disputes between them will be resolved. *See Taylor*, 839 F. Supp. 2d at 263 ("the Court here fails to see how a retroactive application would not impair the parties' rights possessed when they acted"); *Blackwell*, 2012 WL 1229673, at *3-4; *Holmes v. Air Liquide USA LLC*, No. H-11-2580, 2012 WL 267194, at *5-6 (S.D. Tex. Jan. 30, 2012). That is because "the right of parties to agree to arbitration is a *contractual* matter governed by contract law." *Henderson*, 2011 WL 3022535, at *4; *see also Taylor*, 839 F. Supp. 2d at 263; *Blackwell*, 2012 WL 1229673, at *3-4; *M.A. Mortenson/The Meyne Co. v. Edward E. Gillen Co.*, No. Civ. 03-5135 PAM/RLE, 2003 WL 23024511, at *3 (D. Minn. Dec. 17, 2003). Indeed, the Supreme Court has repeatedly reaffirmed that the right of parties to agree to arbitrate particular disputes is a matter of important and substantive contractual rights. *See Concepcion*, 131 S. Ct. at 1752-53

“Arbitration is a matter of contract, and the FAA requires courts to honor parties’ expectations.”); *Rent-A-Center, W., Inc. v. Jackson*, 130 S. Ct. 2772, 2776 (2010). This Court has equally recognized that “[i]t is a fundamental principal that arbitration is a matter of contract.” *Johnson Controls, Inc.*, 729 S.E.2d at 816.

As such, the retroactive application of the Dodd-Frank Act’s arbitration restriction “would not merely affect the jurisdictional location in which such claims could be brought; it would fundamentally interfere with the parties’ contractual rights and would impair the ‘predictability and stability’ of their earlier agreement.” *Henderson*, 2011 WL 3022535, at *4; *Taylor*, 839 F. Supp. 2d at 263; *Blackwell*, 2012 WL 1229673. Accordingly, as a number of other courts that have addressed the retroactivity of other provisions of the Act, including arbitration-related provisions, have found, the Dodd-Frank Act’s arbitration provisions cannot be applied retroactively. *See Molosky v. Wash. Mut., Inc.*, 664 F.3d 109, 113 n.1 (6th Cir. 2011); *Schull v. CitiMortgage, Inc.*, No. 11-15643, 2012 WL 4498498, at *5 (E.D. Mich. Sept. 28, 2012); *Taylor*, 539 F. Supp. 2d at 262-63; *Blackwell*, 2012 WL 1229673, at *3-4; *Holmes*, 2012 WL 267194, at *6; *Henderson*, 2011 WL 3022535, at *4.

The Circuit Court’s finding that the retroactive application of the Dodd-Frank Act “will merely shift the forum for resolving the parties dispute” ignores the fundamental distinctions between individual arbitration and putative class action litigation in court (*see Concepcion*, 131 S. Ct. at 1750-52), disregards Supreme Court precedent reaffirming the importance of arbitration agreements as a matter of substantive contract law, and brushes away, without any analysis, the reasoned decisions of other courts that have addressed the retroactivity issue. Indeed, the Circuit Court relies upon only one case evaluating the Dodd-Frank Act – *Pezza v. Investors Capital Corp.*, 767 F. Supp. 2d 225 (D. Mass. 2011) – which case did not address the amendments to

TILA or the importance of protecting the contractual rights of the parties to an arbitration agreement from the retroactive application of laws that disrupt settled contractual expectations. *See Holmes*, 2012 WL 267194, at *6 (rejecting the *Pezza* court's analysis); *see also Blackwell*, 2012 WL 1229673, at *4 (same); *Henderson*, 2011 WL 3022535, at *4 (same).

Moreover, to the extent the Circuit Court, like the court in *Pezza*, relies upon *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), that reliance is wholly misplaced. First, nothing in *Gilmer* negates the Supreme Court's recent pronouncements regarding the important and substantive contractual rights underlying agreements to arbitrate. *See Concepcion*, 131 S. Ct. at 1752-53. Second, *Gilmer* merely notes that parties do not give up their substantive claims, waive the operation of the substantive law applicable to their particular claims, or lose any substantive rights (applicable to the specific dispute at hand) by agreeing to arbitrate. *See Gilmer*, 500 U.S. at 26. The *Gilmer* decision does not find or suggest that the parties' substantive contractual right to enter into and enforce an agreement to arbitrate in the first instance is somehow jurisdictional such that those contractual rights can be simply brushed away by a later-enacted statute. The Circuit Court incorrectly conflates and confuses the enforcement of substantive contractual rights (which cannot be undone by retroactively applied legislation) with the ultimate result of the enforcement of those substantive rights (arbitration as opposed to judicial adjudication).

Because the retroactive application of the Dodd-Frank Act would impair the parties' substantive contractual rights and render invalid an agreement that was lawful at the time it was entered, the Dodd-Frank Act's arbitration provisions cannot be applied retroactively. The Circuit Court committed legal error when it applied the Act to invalidate the Arbitration Agreement.

C. **The Arbitration Agreement Is Valid And Enforceable Under The FAA And West Virginia State Law**

1. **The Federal Arbitration Act; Standard Of Review**

The FAA reflects a liberal public policy in favor of the strict enforcement of arbitration agreements by the terms set forth therein. *See Concepcion*, 131 S. Ct. at 1748 (the “principal purpose” of the FAA is “to ensure that private arbitration agreements are enforced according to their terms”); *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 599 U.S. 662, 130 S.Ct. 1758, 1773-74 (2010). Under the FAA, agreements to arbitrate are “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2. Where a dispute that is referable to arbitration pursuant to a written agreement is filed in a court, the FAA mandates that, “upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.”³ *Id.* § 4.

The Court’s review of a motion to compel arbitration is limited to two questions:

(1) whether a valid, binding arbitration agreement exists; and (2) whether the claims at issue fall within the scope of the arbitration agreement. *See State ex rel. TD AmeriTrade v. Kaufman*, 692 S.E.2d 293, 298 (W. Va. 2010). Courts must construe any doubts concerning the existence of an agreement to arbitrate or the scope of arbitrable issues in favor of arbitration. *See State ex rel. Clites v. Clawges*, 685 S.E.2d 693, 700 (W. Va. 2009). The FAA’s directive “is mandatory;” courts have “no choice but to grant a motion to compel arbitration where a valid arbitration agreement exists and the issues in a case fall within its purview.” *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 500 (4th Cir. 2002).

³ While the FAA provides that a Court “shall ... stay the trial of the action” when it compels arbitration (*see* 9 U.S.C. § 3), dismissal is proper when all of the claims are arbitrable. *See Adkins*, 303 F.3d at 498, 500.

A party's ability to challenge a valid arbitration agreement is limited. Section 2 of the FAA "permits arbitration agreements to be declared unenforceable 'upon such grounds as exist at law or in equity for the revocation of any contract.'" *Concepcion*, 131 S. Ct. at 1746 (quoting 9 U.S.C. § 2). Thus, in general, the enforceability of agreements to arbitrate may be challenged by "generally applicable contract defenses, such as fraud, duress, or unconscionability." *Id.* (internal quotation marks omitted). The Supreme Court, however, has made clear that "[a]lthough § 2's saving clause preserves generally applicable contract defenses," the FAA does not preserve, and preempts, "state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives" or that are "applied in a fashion that disfavors arbitration." *Id.* at 1747-48.

2. The FAA And *Concepcion* Apply To The States

In its Order, the Circuit Court ruled that the Supreme Court's decision in *AT&T Mobility LLC v. Concepcion* and the analysis of the preemptive scope of the FAA set forth therein does not apply to cases in state court. [A.329-330]. The Court's conclusion is clear legal error.

It is well-established that the FAA applies equally to actions pending in state and federal courts. *See KPMG LLP v. Cocchi*, 132 S. Ct. 23, 24 (2011) ("Agreements to arbitrate that fall within the scope and coverage of the [FAA] . . . must be enforced in state and federal courts."); *Vaden v. Discover Bank*, 556 U.S. 49, 59 (2009) ("The 'body of federal substantive law' generated by elaboration of FAA § 2 is equally binding on state and federal courts."). The Supreme Court has held that when it provides an interpretation of a federal statute, like the FAA, "a state court may not contradict or fail to implement the rule so established." *Marmet Health Care Center, Inc. v. Brown*, -- U.S. --, 132 S. Ct. 1201, 1202 (2012). In applying this principle, the Supreme Court recently overruled and vacated this Court's decision in *Brown v. Genesis Healthcare Corp.*, 724 S.E.2d 250 (W. Va. 2011), on the grounds that the "court's interpretation of the FAA was both incorrect and inconsistent with clear instructions in the precedents of this

Court.” *Id.* at 1203 (“by misreading and disregarding the precedents of this Court interpreting the FAA, [the Court] did not follow controlling federal law implementing that basic principle”). In so ruling, the Supreme Court expressly relied upon and applied *Concepcion* to this Court’s decision in *Brown*. *See id.* at 1203-04. Nothing in *Concepcion* purports to limit its application to federal courts or otherwise.

The Circuit Court’s brief footnote rejecting the Supreme Court’s decision in *Marmet Health Care Center, Inc.* is without merit. The Court’s decision in *Marmet Health Care Center, Inc.* clearly reaffirmed its holding in *Concepcion* that state law is preempted by the FAA when it “prohibits outright the arbitration of a particular type of claim,” and that a state court cannot “disregard[],” “contradict” or otherwise “fail to implement” “the precedents of [the Supreme Court] interpreting the FAA.” *Id.* at 1202-03 (internal quotations omitted). Simply put, the Supreme Court in *Marmet Health Care Center, Inc.* makes clear that the Supreme Court’s precedent interpreting the FAA – including its decision in *Concepcion* – necessarily applies to and governs both state and federal courts’ analyses of motions to compel arbitration under the FAA. *See Nitro-Lift Techs., L.L.C.*, 133 S. Ct. at 503. That the *Marmet* case was not argued and that the decision was “*per curiam*” (yet, notably, unanimous) is of no moment and does not affect the clear message from the Supreme Court. Indeed, the Supreme Court has unequivocally instructed that state courts “must abide by the FAA, which is the supreme Law of the Land . . . and by the opinions of this Court interpreting that law.” *Id.* (internal citation omitted)).

Finally, the Circuit Court’s speculation as to what one justice might do in future cases does not alter the fact that *Concepcion* is binding law on both state and federal courts. Notably, Justice Thomas, in his concurring opinion in *Concepcion*, did not purport to limit his analysis or his joining with the majority on the grounds that the Court’s ruling would not apply to the states.

Justice Thomas, in fact, makes no mention of any such limitation to the majority's analysis in *Concepcion*. Indeed, Justice Thomas' concurrence suggests an even broader preemptive scope of the FAA than adopted by the majority in *Concepcion*. See *Concepcion*, 131 S. Ct. at 1753-54 (Thomas, J., concurring). Nor can Justice Thomas' silence in *Marmet* (he did not file either a concurring or dissenting opinion) be read as a sign of some implicit limitation of the scope and reach of either the FAA or *Concepcion*. Simply put, state courts are bound to follow and apply *Concepcion* and the FAA in the evaluation of arbitration agreements. See *Nitro-Lift Techs.*, 133 S. Ct. at 503. The Circuit Court, therefore, committed clear legal error when it found otherwise.

3. The Arbitration Agreement Is Not Unconscionable Under West Virginia Law And Should Be Enforced Pursuant To Its Terms

A contract is unconscionable under West Virginia law only if it is found to be both procedurally and substantively unconscionable. See *State ex rel. Richmond Am. Homes of W. Va., Inc. v. Sanders*, 717 S.E.2d 909, 920 (W. Va. 2011). In general, such a finding may be warranted where the agreement at issue is characterized by a "gross inadequacy in bargaining power combined with terms unreasonably favorable to the stronger party" (*State ex rel. AT&T Mobility, LLC v. Wilson*, 703 S.E.2d 543, 549 (W. Va. 2010) (internal quotation marks omitted)) and where there is "an overall and gross-imbalance, one-sidedness or lop-sidedness in a contract." *Johnson Controls, Inc.*, 729 S.E. 2d at 816. Under these standards, the Currys' Arbitration Agreement is neither procedurally nor substantively unconscionable.

a. The Arbitration Agreement Is Not Procedurally Unconscionable

Procedural unconscionability may exist where there is a "gross inadequacy in bargaining power" between the parties to an agreement. See *Wilson*, 703 S.E.2d at 549. The starting point for evaluating procedural unconscionability is whether the contract is a contract of adhesion. See *Sanders*, 717 S.E.2d at 921. A contract of adhesion is a contract offered by the party in the

stronger bargaining position on a take-it-or-leave-it basis, that is not subject to negotiation, and that leaves the weaker party with no realistic choice as to its terms. *See id.* at 921; *Wilson*, 703 S.E.2d at 549. While it stands as the starting point of the analysis, a finding that an agreement is a contract of adhesion is not determinative, and courts must “distinguish[] good adhesion contracts which should be enforced from bad adhesion contracts which should not.” *Sanders*, 717 S.E.2d at 921 (internal quotation marks omitted); *see also Concepcion*, 131 S. Ct. at 1750 (“the times in which consumer contracts were anything other than adhesive are long past”). Only adhesion contracts that otherwise evidence a “gross inadequacy in bargaining power” are procedurally unconscionable. *See Wilson*, 703 S.E.2d at 549. The Arbitration Agreement here is not procedurally unconscionable.

First, contrary to the Circuit Court’s finding, the Arbitration Agreement is not a contract of adhesion. As the plain language of the Arbitration Agreement demonstrates, the Agreement was “VOLUNTARY” and the Currys were free to reject the Arbitration Agreement without consequence. [A.62]. Indeed, the Agreement states:

THIS IS A VOLUNTARY ARBITRATION AGREEMENT. IF YOU DECLINE TO SIGN THIS ARBITRATION AGREEMENT, LENDER WILL NOT REFUSE TO COMPLETE THE LOAN TRANSACTION BECAUSE OF YOUR DECISION.

Id. Because the Currys were free to reject the Arbitration Agreement and still obtain their loan, it was not offered on a “take-it-or-leave-it” basis and is thus not a contract of adhesion. *See Clites*, 685 S.E.2d at 700-01. For this reason, alone, the Agreement is not unconscionable.

Second, even assuming that the Arbitration Agreement could be characterized as a contract of adhesion, the Agreement is nevertheless not procedurally unconscionable. That a contract may be considered adhesive does *not* render the contract unconscionable. *See id.* at 700; *Sanders*, 717 S.E.2d at 921. Similarly, an “imbalance in bargaining power” that falls short of a “gross inadequacy” does not render an arbitration agreement unconscionable. *See Johnson*

Controls, Inc., 729 S.E.2d at 817 (“in most commercial transactions it may be assumed that there is some inequality of bargaining power, and this Court cannot undertake to write a special rule of such general application as to remove bargaining advantages or disadvantages in the commercial area” (internal quotation marks omitted)). While the Circuit Court found that the Currys were “unsophisticated consumers,” had “little knowledge of financial matters” and “were not represented by counsel,” the Court’s findings are not supported by any evidence and are based upon mere supposition. See *Miller v. Equifirst Corp. of WV*, No. 2:00-0335, 2006 WL 2571634, at *10-11 (S.D. W. Va. Sept. 5, 2006) (finding “no evidence that [borrowers] did not understand the significance of the transaction into which they were entering”); *Montgomery v. Applied Bank*, 848 F. Supp. 2d 609, 616 (S.D. W. Va. 2012). Notwithstanding the lack of evidence, that facts belie the Circuit Court’s theory, which appears based on nothing more than the erroneous presumption that because the Currys’ original lender may have been more sophisticated than the Currys the Agreement is unenforceable. That is not, and cannot be, the law.⁴

Moreover, the Currys were under no obligation to execute the Arbitration Agreement to close the loan transaction, as the block-letter notice indicated. The notice was presented in legible, all-capital, twelve-point font, was only ten lines long, and was set forth on the same page as and directly above the signature lines of the Agreement. [A.62]. By the plain and unmistakable language of the Agreement, even if the Currys declined to sign and chose to opt out of the Arbitration Agreement, their lender would not have refused to complete the transaction. Such voluntary, opt-out, provisions, by their very nature, weigh against a finding of procedural unconscionability. See *Clites*, 685 S.E.2d at 700-01; *Wilson*, 703 S.E.2d at 549-50;

⁴ Under the Circuit Court’s theory it is likely that every mortgage loan, and possibly any consumer-based contract, entered into in the State of West Virginia is unconscionable and unenforceable.

see also *Sanders*, 717 S.E.2d at 922 (noting that lack of “opt out” or opportunity to “alter” agreement weighed in favor of unconscionability finding).

While the Circuit Court attempts to ignore and brush away the plain language of the Arbitration Agreement by resting solely on the erroneous finding that the Agreement is a contract of adhesion, the Circuit Court’s efforts miss the point. The Currys do not dispute that they executed the Arbitration Agreement, which contained the above-referenced “voluntariness” notice directly above the signature block. As a matter of law, the Currys are presumed to have read the Agreement, are imputed with the knowledge of what they signed, and are bound to the provisions therein. See *Sedlock v. Moyle*, 668 S.E.2d 176, 180 (W. Va. 2008); *Nichols v. Springleaf Home Equity Inc.*, No. 3:11-0535, 2012 WL 777289, at *3 (S.D. W. Va. Mar. 8, 2012) (“Where there is written evidence that the parties agreed, their knowledge is presumed”); *Miller*, 2006 WL 2571634, at *10-11. The Circuit Court cannot re-write the Agreement, or alter its effect, simply because it desires a different result.

In short, even if the Agreement is deemed a contract of adhesion, the Currys were not subject to the type of “gross inadequacy” that would render the Arbitration Agreement procedurally unconscionable.⁵ See *Miller*, 2006 WL 2571634, at *10 (rejecting argument that relationship between loan borrower and lender was “grossly inadequate”).

b. The Arbitration Agreement Is Not Substantively Unconscionable

A contract is substantively unconscionable where its provisions are “unreasonably favorable to the stronger party” (*Wilson*, 703 S.E.2d at 549 (internal quotation marks omitted))

⁵ The Circuit Court’s reliance on *Arnold v. United Cos. Lending Corp.*, 511 S.E.2d 854 (W. Va. 1998) to support of its finding is misplaced. Indeed, this Court has overruled *Arnold* to the extent that *Arnold* set forth a *per se* rule targeting certain arbitration agreements between consumers and mortgage lenders as unconscionable. See *Dan Ryan Builders, Inc. v. Nelson*, -- S.E.2d --, 2012 WL 5834590, at *9 (W. Va. Nov. 15, 2012); see also *Miller*, 2006 WL 2571634, at *11 n.6 (distinguishing *Arnold*).

and so “one-sided” that they “will have an overly harsh effect on the disadvantaged party” (*Sanders*, 717 S.E.2d at 921 (internal quotation marks omitted)). In its order, the Circuit Court found that the Arbitration Agreement was substantively unconscionable because: (1) the class action waiver allegedly precludes the Currys from vindicating their statutory rights under the WVCCPA; (2) the attorneys’ fees restriction in the Agreement is unconscionable; (3) the Agreement lacks “mutuality;” and (4) the Agreement limits discovery. Each of the Circuit Court’s conclusions is flawed and should be rejected by this Court.

i. The Class Action Waiver Is Enforceable And Does Not Render The Agreement Substantively Unconscionable

The mere existence of a class action waiver in an arbitration agreement does not, and cannot, render an agreement unconscionable. *See Sanders*, 717 S.E.2d at 923-24; *Wilson*, 703 S.E.2d at 550 (“[s]tanding alone, the lack of class action relief does not render an arbitration agreement unenforceable on grounds of unconscionability”); *Concepcion*, 131 S. Ct. at 1749-50. Yet, the Circuit Court’s analysis of the class action waiver, in effect, creates exactly the type of *per se* rule that is precluded under the FAA.

The Circuit Court’s reliance on a “vindication-of-statutory-rights” argument (*i.e.*, a small damages/high costs theory) is preempted by Section 2 of the FAA as interpreted by the Supreme Court in *Concepcion*. *See Concepcion*, 131 S. Ct. at 1749-50. Indeed, the “rule” created by the Circuit Court’s decision here effectively mirrors the *Discover Bank* Rule that was rejected by the Supreme Court in *Concepcion*. Under the Circuit Court’s rationale, the inclusion of a class action waiver in an arbitration agreement would render the agreement unconscionable in all cases where the plaintiff’s claimed recovery is “relatively small,” the costs of arbitration are “high,” and where the alleged unlawful behavior is of a “high volume.” [A.327-328]. The dissent in *Concepcion* made this very argument, contending that class proceedings “are

necessary to prosecute small-dollar claims that might otherwise slip through the legal system.” *Id.* at 1753. The majority dispatched the argument with the simple explanation that “States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons.” *Id.* The Court also unequivocally rejected the “small damages” consideration as a legitimate method through which to evaluate class action waivers, describing such a factor as “toothless and malleable.” *Id.* at 1750. The Circuit Court’s rationale here is simply a disguised version of the high costs, small damages, vindication-of-rights analysis that was soundly dispatched in *Concepcion*. See *Concepcion*, 131 S. Ct. at 1746, 1750; *Cruz v. Cingular Wireless, LLC*, 648 F.3d 1205, 1212-14 (11th Cir. 2011); *Jasso v. Money Mart Express, Inc.*, 879 F. Supp. 2d 1038, 1044 (N.D. Cal. 2012) (finding “no principled basis to distinguish between the *Discover Bank* rule” and the analysis pressed by plaintiffs).

Accordingly, the Circuit Court’s application of the vindication-of-statutory-rights analysis to the Arbitration Agreement here “stands as an obstacle to the accomplishment of the FAA’s objectives” and is preempted by the FAA. *Concepcion*, 131 S. Ct. at 1748, 1753; *Coneff v. AT&T Corp.*, 673 F.3d 1155, 1158-60 (9th Cir. 2012) (“by invalidating arbitration agreements for lacking class-action provisions, a court would be doing precisely what the FAA and *Concepcion* prohibit – leveraging ‘the uniqueness of an agreement to arbitrate’ to achieve a result that the state legislature cannot”); *Pendergast v. Sprint Nextel Corp.*, 691 F.3d 1224, 1234-35 (11th Cir. 2012); *Kaltwasser v. AT&T Mobility LLC*, 812 F. Supp. 2d 1042, 1048-49 (N.D. Cal. 2011) (“*Concepcion* forecloses plaintiffs from objecting to class-action waivers in arbitration agreements on the basis that the potential cost of proving a claim exceed potential individual damages.”).

Even if this theory were not preempted, the Currys failed to present any evidence (and the Circuit Court points to none) to affirmatively demonstrate that the arbitration process precludes vindication of their rights under the WVCCPA. A party seeking to avoid arbitration bears the burden to show that the agreed-upon arbitration process precludes effective vindication of the particular claim. *See Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 91-92 (2000); *In re Cotton Yarn Antitrust Litig.*, 505 F.3d 274, 283 (4th Cir. 2007). This burden is not satisfied by mere speculation or conjecture. *See Green Tree*, 531 U.S. at 90-91. Instead, the Currys were required to present *specific evidence* that some aspect of the agreed-upon arbitration process actually impeded the exercise of their statutory rights. *See In re Cotton Yarn*, 505 F.3d at 283, 285, 286-87. The Currys asserted that the class waiver provision effectively precluded vindication of their WVCCPA claims, but offered only speculation about the “risks” that arbitrating their claims might result in less than full exercise of their state statutory rights.

The Currys, moreover, cannot satisfy their burden because the class waiver provision does not limit any substantive right granted to them under the WVCCPA, nor does it restrict their ability to recover actual damages or statutory penalties as authorized by the WVCCPA. The Currys’ potential recovery belies any claim that this case is fairly characterized as a “small damages/high costs” case or that the Currys cannot vindicate their statutory rights in individual arbitration. To the contrary, the Currys’ potential recovery under their claims, as alleged, provides them with sufficient incentives to bring and vindicate their claims on an individual basis in arbitration. Under the WVCCPA, the Currys may recover actual damages and statutory penalties, and expressly seek as least \$1,110.94 in actual damages and \$4,600.00 in statutory penalties for *each* alleged violation of the WVCCPA (for a total of at least \$18,400.00 in statutory penalties). [A.3; 4; 6]. The Currys’ claims, as alleged, are thus worth at least

\$19,510.94. Such an amount of potential recovery is entirely dissimilar from the \$8.46 “low dollar” claim addressed by this Court in *State ex rel. Dunlap v. Berger*, 567 S.E.2d 265 (W. Va. 2002), upon which the Circuit Court relies. See *Wilson*, 703 S.E.2d at 550 n.19, 551 (distinguishing *Dunlap*).⁶ Additionally, the Arbitration Agreement limits the Currys’ obligation to pay arbitration fees, providing that they need only pay up to \$125.00 towards an initial filing fee. Ocwen is obligated to pay all other arbitration fees and costs. [A.61].

Based on these facts, the present case is not one in which the Currys’ individual damages recovery is so predictably small, or the costs of individual arbitration so prohibitively high, so as to effectively prohibit vindication of the Currys’ statutory rights. See *Strawn v. AT&T Mobility, Inc.*, 593 F. Supp. 2d 894, 899 (S.D. W. Va. 2009) (finding WVCCPA claim worth \$5,170.59 was not a “low dollar” claim and was sufficiently “significant” to provide means to vindicate plaintiffs’ rights). The Currys’ potential recovery under their WVCCPA claims, combined with the express arbitration fee-shifting provisions in the Arbitration Agreement confirm that the class action waiver does not preclude plaintiffs from vindicating their statutory rights in individual arbitration. Thus, the class action waiver is not substantively unconscionable and does not

⁶ The Circuit Court’s characterization of the agreement at issue in *Wilson* as more “consumer-friendly” than the Currys’ Arbitration Agreement is of no moment. First, the agreement in *Wilson* did not “guarantee[] a minimum recovery” or “double attorney’s fees” as suggested by the Circuit Court. Instead, the agreement provided for a minimum recovery of \$10,000 and “double” attorneys’ fees *if, and only if*, the final award exceeded the last written settlement offer made by the defendant (an act over which the defendant had complete control). *Wilson*, 703 S.E.2d at 551. Here, the Currys, if successful, stand to recover approximately \$19,000.00 and need not expend more than \$125.00 in arbitration fees; provisions roughly comparable with those in *Wilson*. Second, even if the agreement in *Wilson* is deemed to be more “consumer-friendly” than the Agreement at issue here, that comparison does not, *ipso facto*, render the Currys’ Agreement unconscionable. When its provisions are analyzed on its own (as this Court must do), the Currys’ Arbitration Agreement is not substantively unconscionable.

render the Arbitration Agreement unenforceable. And, even if deemed unconscionable, such a finding would necessarily be preempted by Section 2 of the FAA and *Concepcion*.⁷

ii. The Restriction On Attorneys' Fees Is Not Unconscionable; Even If It Were Unconscionable, The Attorneys' Fees Provision Is Severable

In support of its substantive unconscionability finding, the Circuit Court erroneously relied upon the provision of the Agreement that purports to restrict the parties' recovery of attorneys' fees in arbitration. This provision does not support the Circuit Court's conclusion.

First, the attorneys' fees limitation is not substantively unconscionable because, as set forth above, the availability of actual damages and statutory penalties under the WVCCPA and the arbitration fee-shifting provisions provide the Currys with sufficient incentive and opportunity to vindicate their statutory rights in arbitration. *See James C. Justice Cos. v. Deere & Co.*, No. 5:06-cv-00287, 2008 WL 828923, at *5 (S.D. W. Va. Mar. 27, 2008) (compelling arbitration where plaintiff "has offered no evidence that paying his own attorney's fees and costs in arbitration would prevent it from effectively vindicating its rights"). Nor is there any evidence

⁷ The Circuit Court's citation to *In re Am. Express Merchants' Litig.*, 667 F.3d 204 (2d Cir. 2012) ("*Amex III*"), to support its position is misplaced. First, the Second Circuit concluded that the arbitration agreement at issue made it "*impossible* for the plaintiffs to seek to vindicate their *federal* statutory rights" and rendered its decision pursuant to the "federal substantive law of arbitrability." *Id.* at 213-14, 219 (emphasis added). The decision provides no support for applying its rationale to state statutes or to state unconscionability challenges. *See Coneff*, 673 F.3d at 1158 n.2 (recognizing that vindication of statutory rights analysis is "limited to federal statutory rights"); *see also In re Am. Express Merchants' Litigation*, 681 F.3d 139, 140-41 (2d Cir. 2012) (Pooler, J. concurring in denial of rehearing *en banc*) ("*Amex III* deals with federal statutory rights – a significant distinction [from *Concepcion*]" which addressed only "state contract rights"). Second, the Second Circuit concluded the plaintiffs had *affirmatively* demonstrated with evidence the impossibility of vindicating their antitrust claims in individual arbitration. *See Amex III* at 217-18. Neither the Currys nor the Circuit Court have presented any evidence that it would be "impossible" to vindicate their rights under the WVCCPA. Finally, the Second Circuit's decision is "incompatible with the longstanding principle of federal law embodied in the FAA and numerous Supreme Court precedents, favoring the validity and enforceability of arbitration agreements." *See In re Am. Express*, 681 F.3d at 146 (Jacobs, C.J. dissenting from denial of rehearing *en banc*) (noting that *Concepcion* rejected and foreclosed the vindication-of-federal-statutory-rights analysis employed by the panel in *Amex III*). The Supreme Court has granted *certiorari* to consider the validity of the Second

in the record to suggest that the inability of the Currys to recover attorneys' fees will impair their ability to pursue relief.⁸ *See Johnson Controls, Inc.*, 729 S.E.2d at 820 (rejecting bilateral limitation on consequential damages as grounds for finding of substantive unconscionability). And, in any event, to the extent that such an analysis would render an arbitration agreement invalid, that analysis is preempted by the FAA. *See* Section V.C.3.b.i, *supra*.

Second, the restriction on attorneys' fees is not unfairly one-sided and does not support a "presumption of unconscionability." That is because the attorneys' fees provision in the Arbitration Agreements impacts the Currys' and Ocwen equally. *See* W. Va. Code § 46A-5-104 (providing that a defendant may recover attorneys' fees under the WVCCPA in certain circumstances). Furthermore, the WVCCPA does not guarantee or mandate an award of attorneys' fees, but merely *permits* a trier of fact to grant reasonable attorneys' fees. *See id.* For these reasons, the restriction on attorneys' fees does not support a finding of substantive unconscionability. *See Johnson Controls, Inc.*, 729 S.E.2d 820 (finding arbitration clause "not one-sided" where limitation on recovery of consequential damages applied to both parties).

Third, even if the attorneys' fee provision is unconscionable, the fee limitation is severable from the Arbitration Agreement, which otherwise remains enforceable. The Currys' Deed of Trust, into which the Arbitration Agreement is incorporated ([A.40; 60]), contains the following severability clause:

In the event that any provision or clause of this Security Instrument ... conflicts with Applicable Law, such conflict shall not affect other provisions of this Security Instrument ... which can be given effect without the conflicting provision.

Circuit's decision in light of *Concepcion*. *See Am. Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 594 (Nov. 9, 2012).

⁸ This Court has rejected the argument that "without the guarantee of reimbursement of attorney fees and costs for successful litigants, West Virginia consumers are financially unable to bring actions under the WVCCPA, and West Virginia lawyers are unwilling to handle such cases." *Chevy Chase Bank v. McCamant*, 512 S.E.2d 217, 226-27 (W. Va. 1998).

[A.53]. In its Order, the Circuit Court failed to address the severability clause or Ocwen's argument regarding the severability of the attorneys' fees restriction.

Where an agreement to arbitrate contains an unconscionable provision, but the underlying contract provides for severance of such provisions and the subject provision is not essential to the agreement, the remainder of the agreement should be enforced. *See Faber v. Menard, Inc.*, 367 F.3d 1048, 1054 (8th Cir. 2004); *Kaneff v. Del. Title Loans, Inc.*, 587 F.3d 616, 624-25 (3d Cir. 2009) (enforcing arbitration agreement after severing provision requiring parties to pay own attorneys' fees); *James C. Justice Cos.*, 2008 WL 828923, at *4-5 (severing treble damages restriction and enforcing arbitration agreement). This Court has similarly recognized that an unconscionable provision in an arbitration agreement does not *ipso facto* invalidate the entire agreement and that such provisions may be severed from the agreement. *See Sanders*, 717 S.E.2d at 920 (a court may "enforce the remainder of the contract without the unconscionable clause, or limit the application of any unconscionable clause"). In *State ex rel. Dunlap v. Berger*, 567 S.E.2d 265, 283 n. 15 (W. Va. 2002), upon which the Circuit Court solely relied, this Court noted that "a provision in a contract of adhesion that would operate to restrict the availability of an award of attorney fees to less than that provided for in applicable law would . . . be presumptively unconscionable." Importantly, however, the Court did not state that such a provision would render an entire agreement unconscionable or unenforceable, but stated only that the particular attorneys' fee restriction "provision" would be unconscionable. *See id.*

Here, the attorneys' fees restriction is secondary, and not essential, to the Arbitration Agreement's main purpose – that is, to require the parties to submit any disputes related to or arising from the Currys' loan to binding individual arbitration. The severance of the attorneys' fees restriction would not affect or impair the essential objective of the Agreement. As such, if

the Court finds the attorneys' fees restriction unconscionable (which it should not), the Court should sever that provision and enforce the remaining provisions of the Arbitration Agreement.

iii. The Arbitration Agreement Is Not Otherwise Substantively Unconscionable

In finding the Arbitration Agreement substantively unconscionable, the Circuit Court relied upon two additional grounds: (1) that the Arbitration Agreement “lacks mutuality;” and (2) that the Agreement “may prevent [the Currys] from conducting meaningful and full discovery.” [A.326]. Neither of these findings have merit under the circumstances presented here.

First, the Arbitration Agreement is an enforceable bilateral agreement. West Virginia law does not require complete mutuality, but requires only that “[a]greements to arbitrate . . . contain at least a modicum of bilaterality.” *Sanders*, 717 S.E.2d at 921 (quotations omitted). The Arbitration Agreement contains more than a “modicum of bilaterality” as it provides that both parties are bound to arbitrate “[a]ll disputes, claim, or controversies.” [A.60]. That the Agreement contains a limited exception to permit Ocwen to accelerate payments and foreclose per applicable state law does not render the agreement unfairly one-sided or unconscionable. *See Baker v. Green Tree Servicing LLC*, No. 5:09-cv-00332, 2010 WL 1404088, at *4 (S.D. W. Va. Mar. 31, 2010) (“The lender’s ability to foreclose or repossess a home when the buyer defaults . . . is a remedy independently available to the lender by virtue of law, and the contract does no more than preserve that right”); *Miller*, 2006 WL 2571634, at *11. Indeed, “[t]he exception for proceedings related to foreclosure is one that is not only common in arbitration agreements but quite necessary in order to effectuate foreclosure and a retaking of the subject property by lawful processes, where needed, without breach of the peace.” *Miller*, 2006 WL 2571634.

Second, the potential that discovery *might* be limited in arbitration similarly does not support a finding of unconscionability. The Arbitration Agreement does not expressly limit the

discovery available to either party in arbitration; it provides only that discovery “MAY BE LIMITED” by the applicable rules of procedure. [A.62]. Neither the Circuit Court nor the Currys explain how this potential discovery restriction has any substantive effect on the adjudication of the Currys’ claims or that discovery would actually be limited in any material manner. It is well-settled that discovery limits in arbitration do not support a finding of substantive unconscionability. *See Gilmer*, 500 U.S. at 31 (“by agreeing to arbitrate, a party trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration” (internal quotation marks omitted)); *In re Cotton Yarn Antitrust Litig.*, 505 F.3d at 286 (“Because limited discovery is a consequence of perhaps every agreement to arbitrate, it cannot, standing alone, be a reason to invalidate an arbitration agreement.”); *Hopkins v. World Acceptance Corp.*, 798 F. Supp. 2d 1339, 1349-50 (N.D. Ga. 2011).

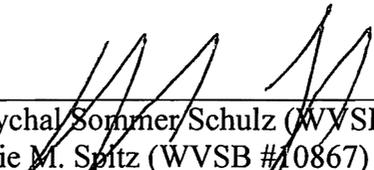
VI. CONCLUSION

Ocwen respectfully requests that the Court issue a Rule to Show Cause and thereafter grant a writ of prohibition to the Circuit Court of Kanawha County, West Virginia to correct the clear legal errors in the Circuit Court’s Order Denying Ocwen’s Motion to Compel Arbitration, and order the following relief: (1) halt enforcement of the Circuit Court’s Order; (2) order that the Circuit Court enforce the Arbitration Agreement and compel the Currys to submit their claims to individual arbitration; and (3) dismiss the Currys’ Complaint or, alternatively, stay this action pending arbitration.

Respectfully submitted,

OCWEN LOAN SERVICING, LLC,

By its attorneys,



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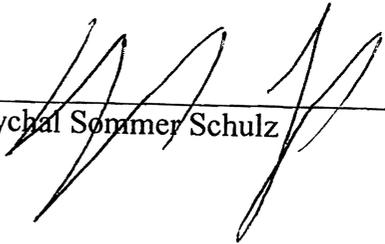
Email: arie.spitz@dinsmore.com

Dated: February 20, 2013

VERIFICATION
Per West Virginia Code § 53-1-3

I, Mychal Sommer Schulz, counsel for the Petitioner, Ocwen Loan Servicing, LLC, hereby certify that the facts and allegations contained in the **Petition for Writ of Prohibition** and **Appendix** are true and correct to the best of my belief and knowledge.

Dated: February 20, 2013



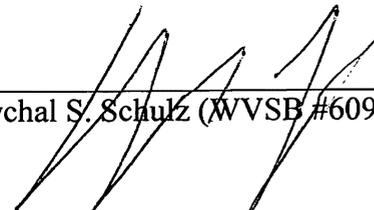
Mychal Sommer Schulz

CERTIFICATE OF SERVICE

I, Mychal Sommer Schulz, counsel for the Petitioner, Ocwen Loan Servicing, LLC, hereby certify that I served a true copy of the foregoing **Petition for Writ of Prohibition** and **Appendix** upon the following individuals, via hand delivery, on this 20th day of February, 2013.

The Honorable Carrie L. Webster
CIRCUIT COURT OF KANAWHA COUNTY
Kanawha County Courthouse
111 Judicial Annex
Charleston, WV 25301

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